KM Quarry Sdn Bhd v Ho Hup Construction Co Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–3 OF 2005
LOW HOP BING J
19 JUNE 2006

Civil Procedure — Summary judgment — Appeal — Triable issues — Whether defendant had raised triable issues in plaintiff's application for summary judgment

The defendant was appointed the contractor for certain construction works by the employer. The defendant in turn appointed the plaintiff as its subcontractor. The subcontract agreement provided, inter alia, for the plaintiff to be paid directly by the employer whilst expressly providing against any privity of contract between the plaintiff and the employer. The plaintiff was to be paid by the employer after certification of its claims by the contractor. The plaintiff sued the defendant to recover payment in respect of three certificates. At first instance, its application for summary judgment was allowed. The defendant appealed claiming that there were the following triable issues, viz: (i) whether there existed a collateral contract between the plaintiff and the employer wherein the plaintiff had the right to sue the employer who had agreed to pay the plaintiff directly; (ii) whether the plaintiff by receiving payments directly from the employer was estopped from claiming payment from the defendant; (iii) the defendant had absolutely assigned its rights to seek payment from the employer and so payment should be sought by the plaintiff from the employer; (iv) the plaintiff was precluded by s 42 of the Contracts Act 1950 from making claims against the defendant; and (v) the balance three certificates were not properly certified. The plaintiff, inter alia, contended that a letter dated 17 February 2005 issued by the defendant's accountant was in fact an admission by the defendant of the sum due and payable under the balance three certificates.

Held, dismissing the appeal with costs:

(1) By virtue of cl 6.1 of the subcontract agreement, interim payments had to be made to the subcontractor (plaintiff) within 45 days of the contractor's (defendant's) receipt of the subcontractor's (plaintiff's) claim and, after the contractor's (defendant's) certification, such payments were to be made by the employer to the subcontractor (plaintiff). Clause 4.3 clearly provided that there would be no privity of contract between the subcontractor (the plaintiff) and the employer. Hence, in so far as the payments on the interim certificates were concerned, the parties to the contract were wholly and exclusively the plaintiff and the defendant; the employer being a third party was a stranger thereto. Only the original parties to the contract had the right to sue or be sued upon it. A third party such as the employer being a stranger did not enjoy the right to sue and incurred no liability to be sued (see paras 11, 13–14).

(2) The plaintiff herein could rely on the doctrine of estoppel. The very issue of estoppel raised for the defendant worked in favour of the plaintiff, in that the defendant had, consistent with cl 6.1 and the defendant's letter at all material times expressly agreed with the plaintiff that the employer would make all payments on interim certificates approved by the defendant and such payments had been effected on the 14 certificates, leaving the balance three certificates, in which case the defendant should be estopped from asserting that nothing was due from the balance three certificates. The defendant's attempt to frustrate such payments was certainly unconscionable and inequitable, in which case the plaintiff was entitled to invoke the doctrine of estoppel against the defendant (see para 27).

(3) The defendant's letter did not contain any express or implied intention to create any absolute assignment. The defendant had also not given any express notice in writing of the assignment to the employer. The defendant had to all intents and purposes, agreed to the payment mechanism set out in the defendant's letter, the contents of which the parties had expressly agreed pursuant to cl 6.1. Had it been the defendant's intention to create an absolute assignment the defendant would have been reasonably expected to set it out in clear and unambiguous terms in a properly constituted document in this important commercial transaction rather than clinging on to something that was never within the reasonable contemplation of the parties (see paras 39–40).

(4) In the instant case, there was no agreement between the plaintiff and the defendant that the payment by the employer on the 14 certificates would discharge the defendant from the other payments due and payable under the balance three certificates. Section 42 of the Contracts Act 1950 did not apply (see paras 49, 52).

(5) The first 14 certificates and the balance three certificates had been certified by the defendant in identical fashion. There had been no suggestion by the defendant that the certification of the first 14 certificates were not valid nor was there any submission that the honouring of the first 14 certificates had been wrongly effected. The doctrine of estoppel expressly contained in s 115 of the Evidence Act 1950 and as enunciated by the Federal Court in Boustead Trading applied to preclude the defendant from raising such submission (see para 56).

(6) The fact that cl 6.1 provided for the payment by the employer did not in any way affect the legal position of an interim certificate, as enunciated by the Supreme Court (see para 65).

(7) Upon a true construction of the contents of the two contemporary documents — the letter by the defendant's accountant and the plaintiff's reply of 25 March 2005, there could be no doubt that the defendant had in clear and unambiguous words confirmed and admitted the balance due from the defendant as shown in the defendant's records and that balance was the amount certified in the balance three certificates. The letter of defendant's accountant was a singularly significant and crucial contemporary document that had completely negated all contentions raised for the defendant. The letter constituted a cogent built-in self-rebuttal wiping out the defendant's entire case (see paras 73–74).

[Bahasa Malaysia summary

Defendan telah dilantik sebagai kontraktor untuk kerja-kerja pembinaan tertentu oleh majikan. Defendan seterusnya melantik plaintif sebagai subkontraktornya. Di dalam perjanjian subkontraktor yang disediakan antara lain pembayaran akan dibayar secara terus oleh majikan kepada plaintif sementara dengan jelasnya jika bertentangan terhadap priviti ke atas perjanjian di antara plaintif dengan majikan. Plaintif akan dibayar oleh majikan selepas tuntutannya diperakui oleh kontraktor. Plaintif mendakwa defendan untuk mendapatkan semula bayaran berdasarkan tiga perakuan. Pada peringkat awal, permohonan untuk penghakiman terus telah dibenarkan. Defendan merayu dan mendakwa bahawa terdapatnya isu-isu yang perlu dibicarakan iaitu: (i) sama ada wujudnya perjanjian sampingan di antara plaintif dengan majikan yang mana plaintif mempunyai hak untuk mendakwa majikan yang telah bersetuju untuk membayar plaintif secara terus; (ii) sama ada plaintif dengan menerima pembayaran secara terus daripada majikan telah diestop daripada menuntut bayaran daripada defendan; (iii) defendan telah menyerahkan haknya secara mutlak untuk meminta bayaran daripada majikan dan pembayaran seharusnya diminta oleh plaintif kepada majikan; (iv) plaintif adalah terhalang berdasarkan s 42 Akta Kontrak 1950 daripada membuat tuntutan ke atas defendan; dan (v) baki tiga perakuan adalah tidak sempurna diperakui. Plaintif antaranya menegaskan bahawa, satu surat bertarikh 17 Februari 2005 yang dikeluarkan oleh akauntan defendan, sebenarnya adalah perakuan daripada defendan untuk jumlah tertunggak dan perlu dibayar di bawah baki tiga perakuan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Berdasarkan kl 6.1, perjanjian subkontrak, pembayaran sementara hendaklah dibuat kepada subkontraktor (plaintif) dalam 45 hari daripada tuntutan subkontraktor (plaintif) diterima oleh kontraktor (defendan) dan selepas diperakui oleh kontraktor (defendan), pembayaran tersebut hendaklah dibuat oleh majikan kepada subkontraktor (plaintif). Klausa 4.3 jelas menunjukkan bahawa ketiadaan priviti ke atas perjanjian antara subkontraktor (plaintif) dengan majikan. Selanjutnya, sepanjang pembayaran adalah perakuan sementara, pihak-pihak terhadap perjanjian adalah secara keseluruhan dan eklusif adalah plaintif dan defendan, majikan pula adalah pihak ketiga and pihak asing di sini. Hanya perjanjian asal pihak-pihak terhadap perjanjian mempunyai hak untuk mendakwa atau didakwa berdasarkannya. Pihak ketiga seperti majikan menjadi pihak asing tidak menikmati hak untuk mendakwa dan menjadikan tiada tanggungjawab untuk mendakwa (lihat perenggan 11, 13–14).

(2) Plaintif di sini boleh bergantung kepada doktrin estopel. Isu utama estopel telah dibangkitkan untuk defendan yang bekerja dengan bantuan plaintif, oleh yang demikian, defendan adalah selaras dengan klausa 6.1 dan surat defendan pada sepanjang masa yang material secara jelasnya bersetuju dengan plaintif yang mana majikan perlu membuat semua bayaran ke atas perakuan sementara yang diluluskan oleh defendan dan pembayaran tersebut telah pun memberikan kesan ke atas 14 perakuan, yang meninggalkan baki tiga

perakuan, yang mana dalam kes ini defendan seharusnya diestop daripada menegaskan yang tiada baki yang patut diberikan daripada baki tiga perakuan. Defendan cuba untuk menghalang pembayaran tersebut yang sememangnya tidak berhati perut dan saksama, ini di mana plaintif adalah berhak untuk menggunakan doktrin estopel terhadap defendan (lihat perenggan 27).

(3) Surat defendan tidak mengandungi apa-apa niat yang jelas atau tersirat untuk membuat penyerahan hak yang mutlak. Defendan juga tidak diberikan notis yang jelas secara bertulis berkenaan dengan penyerahan hak kepada majikan. Defendan mempunyai kesemua niat dan maksud, bersetuju dengan cara bayaran yang dinyatakan di dalam surat defendan, kandungannya seperti mana yang dipersetujui dengan jelas menurut klausa 6.1. Jika niat defendan untuk mewujudkan satu penyerahan hak yang mutlak, defendan hendaklah menggunakan budi bicaranya untuk menyediakan secara jelas dan tidak samar dalam sebuah dokumen yang dibentuk dengan baik di dalam urus niaga komersil yang penting daripada hanya bergantung kepada sesuatu yang tidak di dalam lingkungan pemikiran yang munasabah pihak-pihak (lihat perenggan 39–40).

(4) Di dalam kes ini, tidak terdapat perjanjian di antara plaintif dengan defendan berkenaan dengan pembayaran oleh majikan ke atas 14 perakuan yang dijelaskan oleh defendan daripada pembayaran yang lain adalah tertunggak dan harus dibayar di bawah baki tiga perakuan. Seksyen 42 Akta Kontrak 1950 tidak terpakai (lihat perenggan 49, 52).

(5) 14 perakuan terdahulu dan baki tiga perakuan telah pun diperakui oleh defendan menggunakan gaya yang sama. Tiada cadangan daripada defendan yang mana memperakui 14 perakuan terdahulu adalah tidak sah atau hujahan berkenaan dengan meluluskan 14 perakuan terdahulu adalah secara salah. Doktrin estopel dengan jelad terkandung di dalam s115 Akta Keterangan 1950 dan dijelaskan oleh Mahkamah Persekutuan di dalam Bousted Trading diguna pakai untuk menghalang defendan daripada membangkitkan hujahan tersebut (lihat perenggan 56).

(6) Fakta di mana kl 6.1 mensyaratkan untuk pembayaran oleh majikan tidak secara memberi kesan ke atas sudut perundangan perakuan sementara seperti yang dijelaskan oleh Mahkamah Agung (lihat perenggan 65).

(7) Berdasarkan kepada pembuatan kandungan yang sebenar dua dokumen terkini — surat daripada akauntan defendan dan balasan plaintif bertarikh 25 Mac 2005, tanpa diragui, defendan secara jelas dan tidak samar mengesahkan dan mengakui baki tertunggak daripada defendan seperti yang ditunjukkan di dalam rekod defendan dan baki adalah jumlah yang diperakui di dalam baki tiga perakuan. Surat daripada akauntan defendan adalah satu dokumen terkini yang penting dan penentu yang mana keseluruhannya mensia-siakan semua perbalahan yang dibangkitkan oleh defendan. Surat tersebut mengandungi kandungan pematahan meyakinkan yang memusnahkan keseluruhan kes defendan (lihat perenggan 73–74).]

Notes

For cases on appeal of summary judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6070–6188.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd [1997] 3 MLJ 620 (refd)
Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, intervenor) [1991] 3 MLJ 50 (refd)
Boustead Trading [1985] Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Chinn Swee Onn v Puchong Realty Sdn Bhd [1990] 1 MLJ 108 (refd)
Chong Hee v Credit Corp (M) Bhd [1999] MLJU 456 (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (refd)
Eastern Mining & Metals Co Sdn Bhd v MM Ismail & Ors [1976] 1 MLJ 166 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (refd)
Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd [1992] 2 MLJ 137 (refd)
Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perils Sdn Bhd [1987] 2 MLJ 332 (refd)
Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Nik Jaafar [1975] 2 MLJ 82 (refd)
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 (refd)
Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170 (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761 (refd)
Krishnan Rengasamy, Re; ex p Arab Malaysian Credit Bhd [2001] 4 CLJ 797 (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)
Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor [1998] 3 MLJ 117 (refd)
Low Yoke Lan v Ng Ooi Kiat [2001] 4 AMR 4781 (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1955] 2 MLJ 57 (refd)
Ribaru Bina Sdn Bhd (dahulu dikenali sebagai Ribar Resources Sdn Bhd) & Anor v Bakti Kausar Development Sdn Bhd & Anor [2003] 5 AMR 165 (refd)
Sime Bank Bhd (formerly known as United Malayan Banking Corp Bhd) v Kuala Lumpur City Securities Sdn Bhd [2001] 5 MLJ 670 (refd)
TT Martech Sdn Bhd v Wing Construction (M) Sdn Bhd [2005] 2 MLJ 463 (refd)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)
Tweddle v Atkinson (1861) 1 B & S 393 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Companies Act 1965 ss 167, 168, 169, 170, 171
Contracts Act 1950 ss 41, 42
Evidence Act 1950 ss 91, 92, 115
Law of Property Act 1925 [UK] s 136
Rules of the High Court 1980 O 14

Leong Yin Wei (Azman Davidson & Co) for the plaintiff.
Gerard Lourdes (Jasbeer Nur Hakimah & Rajpal) for the defendant.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the appellant-defendant ('the defendant') against the decision of the learned registrar who had on 22 July 2005 entered summary judgment for the plaintiff in the sum of RM3,233,474.37 together with interest and costs, under O 14 of the Rules of the High Court 1980.

[2] A reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980 unless the context otherwise requires.

FACTUAL BACKGROUND

[3] Vide letter of award dated 3 September 2002, the defendant appointed the respondent-plaintiff ('the plaintiff') as its sub-contractor for the supply and laying of pavement works ('the works') for the project described as 'Drainage, Pavement And Traffic Management For Cadangan Membina Jalan Raya Durian Tunggal-Paya Rumput-Sg Udang Melaka' ('the project') at a consideration of RM25,731,880.

[4] The defendant was the main contractor in the project whose employer, for brevity, was Revolutionary Technology Holdings Sdn Bhd ('the employer').

[5] Upon completion of the works, the plaintiff received from the employer directly a total sum of RM16,819,409.88 in respect of the works vide interim certificates 1 to 14 and part payment for interim certificate 15 (collectively, 'the first 14 certificates').

[6] The essence of the plaintiffs' claim against the defendant is for payment on interim certificate 15 (balance only), and certificates 16 to 18 (collectively, 'the balance three certificates') amounting to RM3,233,474.37.

[7] The defendant vide its accountant's letter dated 17 February 2005 to the plaintiff stated that the defendant's auditors Ernst & Young ('the defendant's auditors') wished to confirm the balance due from the defendant on the plaintiffs' account at 31 December 2004 which was shown in the defendant's account as RM4,069,493.46. The plaintiff has vide letter dated 25 March 2005 confirmed the said sum which includes the sum claimed by the plaintiff herein. The legal effect of these two letters will be explained later in this judgment.

COLLATERAL CONTRACT

[8] Defendant's learned counsel Mr Gerard Lourdes submitted that a triable issue has been raised as to whether there exists a collateral contract between the plaintiff and the employer wherein the plaintiff has the right to sue the employer who had agreed to pay the plaintiff directly in respect of the works undertaken by the plaintiff,

arid that cl 6.1 of the special provisions to the conditions of subcontract ('cl 6.1') is evidence of such a collateral contract, as this clause is calculated to get) around the doctrine of privity of contract that is preserved in cl 4.3 of the conditions of subcontract ('cl 4.3') thereby superseding cl 6.1, on the maxim of *generalia specialibus non derogant*, and this is fortified by the defendant's letter dated 24 January 2003 to the employer ('the defendant's letter') wherein it was stated that the plaintiff had requested direct payment from the employer in respect of the works. The defendant relied on:

(i) *Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd* [1992] 2 MLJ 137 (SC);

(ii) *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (FC);

(iii) *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC); and

(iv) *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 (FC).

[9] Plaintiffs' learned counsel Ms Leong Yin Wei gave the short answer that there was no privity of contract between the plaintiff and the employer, and sought support in:

(i) *Chitty on Contracts* (27th Ed) Vol1 para 18-065;

(ii) *Lim Yoh v Astana Strategi (M) Sdn Bhd & Anor* [1998] 3 MLJ 117; and

(iii) s 41 of the Contracts Act 1950.

[10] In my judgment, cl 6.1 merits reproduction as follows:

> 6. Interim Payments
>
> 6.1 Interim Payments shall be made to the Subcontractor within forty five (45) days upon receipt of the Subcontractor claim by the Contractor. The submission of the interim claims shall be duly substantiated and approved invoice or statement of claims by the Contractor and subj ect to the provisions of Clause 16 of the Conditions of Subcontract. After certification by the Contractor payment shall be made direct by the Employer to the Subcontractor.

[11] Upon a true construction of cl 6.1, it is plain and obvious to me that it is mandatory for interim payments to be made to the subcontractor (plaintiff) within 45 days of the contractor's (defendant's) receipt of the plaintiffs' claim and, after the defendant's certification, it is mandatory for such payments to be made by the employer to the plaintiff.

[12] Clause 4.3, where relevant, expressly provides as follows:

> 4.3 Nothing herein shall toe constructed as creating any privity of contract between the Subcontractor and the Employer.

[13] Effect must be given to the intention of the parties in cl. 4.3 as it is clear and unambiguous in that there shall be no privity of contract between the subcontractor,

ie the plaintiff and the employer. Hence, in so far as the payments on the interim certificates are concerned, the parties to the contract are wholly and exclusively the plaintiff and the defendant; the employer being a third party is a stranger thereto.

[14] In the context of cll 6.1 and 4.3, I am of the view that only the original parties to the contract have the right to sue or be sued upon it, so that a third party such as the employer being a stranger does not enjoy the right to sue and incurs no liability to be sued: *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 per Lord Wilberforce JC (PC); *Tweddle v Atkinson* (1861) 1 B & S 393 per Wightman J; and *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 per Lord Haldane, LC; *Chitty on Contracts* (27th Ed) Vol 1 para 18-065; *Lim Yoh* per Augustine Paul JC (now FCJ); and s 41 of the Contracts Act 1950.

[15] I shall now consider the authorities relied on by the defendant.

[16] In *Eushun Properties*, the facts reveal a loan agreement and a recovery of the loan under O 14, but do not share any, similarity with the construction of cll 6.1 and 4.3 in the instant appeal.

[17] Both *Tan Swee Hoe*, and *Keng Huat Film*, concern landlord and tenant litigations, while *Ooi Boon Leong*, sets out the principle relating to the conclusiveness of a certificate of indebtedness.

[18] However, in all the aforesaid four authorities, there was a common denominator based on ss 91 and 92 of the Evidence Act 1950 governing the admissibility or otherwise of oral evidence in relation to a written agreement. Since the plaintiff is not objecting to the admissibility of the defendant's letter, this has obviated the need for me to engage in an analysis pf these evidential provisions, as both the parties are at liberty to refer to the defendant's letter in their submissions.

[19] The defendant's letter is an affirmation of the direct payments by the employer to the plaintiff and is completely consistent with cl 6.1 and serves the purpose of facilitating and not frustrating such payments. Hence, cll 6.1 and 4.3 when read conjunctively do not support the submission for the defendant at all. There can be no issue of any collateral contract, less so a triable issue.

ESTOPPEL

[20] The second issue raised for the defendant was whether the plaintiff by receiving payments directly from the employer is estopped from claiming payment from the defendant, and, relying on the equitable doctrine of election, it was submitted that estoppel applied against the plaintiff. Reference was made to *Boustead Trading* [1985] Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (FC); *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC); and *Eastern Mining & Metals Co Sdn Bhd v MM Ismail & Ors* [1976] 1 MLJ 166 (FC).

[21] For the plaintiff, it was contended that pursuant to cl 6.1 and the defendant's letter, the contractual obligation and authority to evaluate and certify the plaintiffs' claims remain with the defendant and that direct payments made by the employer to the plaintiff are accounted as payments made by the employer to the defendant.

[22] In my judgment, it is to be noted that except for the label used by the defendant, the effect of this issue of estoppel is not dissimilar from the preceding issue.

[23] The doctrine of estoppel has found statutory expression generally in Chapter VIII of the Evidence Act 1950 and more specifically in s 115 thereof which reads:

> 115 Estoppel
>
> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

[24] In order to appreciate the applicability of the authorities cited for the defendant, it is absolutely essential that the salient facts in each of them be identified first.

[25] In *Boustead Trading*, the plaintiff/respondent ('the plaintiff) and Chemtrade entered into a factoring agreement in October 1989 whereby Chemtrade factored its book debts to the plaintiff. In November 1989, the defendant-appellant ('the defendant') and Chemtrade entered into a distributorship agreement and Chemtrade appointed the defendant as sole distributor of its products. Chemtrade would invoice the defendant for the goods supplied and the defendant would issue bills to Chemtrade from time to time should Chemtrade be indebted to them. In February 1990, Chemtrade and the plaintiff notified the defendant of the factoring agreement. All Chemtrade's invoices were endorsed with the notice of assignment from Chemtrade to the plaintiff. The defendant did not complain about any of the invoices indorsed and sent by the plaintiff to it within the 14-day period prescribed by the indorsement. The defendant alpo did not make any contemporaneous challenge as to the plaintiffs' right to impose the 14-day period by way of indorsement. The defendant paid the plaintiff on several of the invoices, but not on about 20 invoices. The plaintiffs' application for summary judgment against the defendant for RM391,832.53 was dismissed. The plaintiffs' appeal was partly allowed for RM93,431.75 while the balance went on trial. On the issue of whether the defendant's failure to object to the imposition of the 14-day period by the plaintiff could be considered as an estoppel, the Federal Court speaking through Gopal Sri Ram JCA held:

(a) As the defendant did not merely remain silent but had actually made payments on those invoices without any protest, a reasonable man would assume, as the plaintiff did, that the defendant was agreeable to the imposition of the 14-day limit (p 2894); and

(b) The defendant's attempt to raise this 14-day limit seven months later was unconscionable and inequitable, and should be estopped from asserting that nothing was due on these invoices.

[26] At pp 2889 and 2890, his Lordship added that:

(a) The docrine of estoppel is a flexible principle by which justice is done according to the circumstances as it is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice; and

(b) The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone since plaintiffs too may have recourse to it; estoppel may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

[27] A careful consideration of the Federal Court judgment leads me to the conclusion that the plaintiff herein may rely on this doctrine, and that in effect the very issue of estoppel raised for the defendant herein works in favour of the plaintiff before me in that the defendant has, consistent with cl 6.1 and the defendant's letter at all material time expressly agreed with the plaintiff that the employer should make all payments on interim certificates approved by the defendant and such payments had been effected on the 14 certificates, leaving the balance three certificates, in which case the defendant should be estopped from asserting that nothing was due from the balance three certificates. The defendant's attempt to frustrate such payments was certainly unconscionable and inequitable, in which case the plaintiff herein is entitled to invoke the doctrine of estoppel against the defendant herein.

[28] The above judgment was applied by the same learned judge who delivered the judgment of the Federal Court in *Lai Yoke Ngan*.

[29] There can be no doubt that these two authorities actually militate against the defendant.

[30] In *Eastern Mining*, the respondent who had accepted the more generous retrenchment benefits under a collective agreement subsequently sued for a second payment under his individual term of employment. Both the magistrate's court and High Court gave judgment for the respondent. The Federal Court through the judgment of Suffian LP (as he then was) allowed the appeal and held that the respondent was not entitled to double payments.

[31] In the instant appeal, the plaintiff is not claiming for double payments but only the payments due under the balance three certificates and so the ratio in *Eastern Mining*, is unhelpful to the defendant.

[32] That being the case, I am unable to find any triable issue here.

ASSIGNMENT OF RIGHT

[33] It was argued for the defendant that under s 4(3) of the Civil Law Act 1956, the defendant had absolutely assigned its rights to seek payment from the employer and so payment should be sought by the plaintiff from the employer, citing *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 (FC).

[34] The plaintiff took the position that:

(i) the issue of assignment was never raised in the defendant's affidavit or contemporaneous correspondence between the parties, and it was an afterthought; and

(ii) there was no legal assignment, relying on *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620 (HC); *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, intervenor)* [1991] 3 MLJ 50 (HC); and *Sime Bank Bhd (formerly known as United Malayan Banking Corp Bhd) v Kuala Lumpur City Securities Sdn Bhd* [2001] 5 MLJ 670 (HC).

[35] In my judgment, except for the label used by the defendant, this issue is also substantially similar to the aforesaid two issues viz collateral contract and estoppel. Although the defendant's submission takes the appearance of an afterthought, I shall nevertheless consider whether it is a triable issue.

[36] Section 4(3), where relevant, provides as follows:

> 4(3) Any absolute assignment, by writing, under the hand of the assignor, of which express notice in writing has been given to the debtor, shall be deemed to have been, effectual in law, subject to all equities to pass and transfer the legal right to the debt from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

[37] In *Bank of Commerce (M) Bhd*, at p 630E, Augustine Paul JC (now FCJ) explained that to constitute an absolute assignment, the conditions stipulated in s 4(3) are:

(i) the assignment must be absolute, and not purport to be by way of charge only:

(ii) the assignment must be in writing under the hand of the assignor; and

(iii) express notice in writing of the assignment must be given to the debtor or other person from whom the assignor would have been entitled to claim the debt.

[38] The Federal Court had the occasion to consider s 4(3), in *Khaw Poh Chhuan*, Peh Swee Chin FCJ (as he then was) at pp 1080 and 1081:

(i) illuminated that s 4(3) has not made any alteration to the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee

can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperative, to join the assignor as a co-defendant; and

(ii) applied the conclusion of Professor Furmston's (11th Ed) of *Cheshire, Fifoot and Furmston's Law of Contract* at p 498 in regard to s 136 of England's Law of Property Act 1925 which is in pari materia with our s 4(3), that:

> The statute has not altered the law in substance. It is merely machinery. It does not confer a right of action which did not exist before but enables the right of action that has always existed to be pursued in a less roundabout fashion.

[39] On the facts before me, it is to be noted that the defendant's letter did not contain any express or implied intention to create any absolute assignment, neither had the defendant given any express notice in writing of the assignment to the debtor, ie the employer.

[40] The defendant had to all intents and purposes agreed to the payment mechanism set out in the defendant's letter, the contents of which the parties herein have expressly agreed pursuant to cl 6.1. Had it been the defendant's intention to create an absolute assignment under s 4(3), the defendant would have been reasonably expected to set it out in clear and unambiguous terms in a properly constituted document in this important commercial transaction rather than clinging on to something that was never within the reasonable contemplation of the parties.

[41] For this purpose, in relation to a commercial transaction such as a put option agreement, a similar sentiment was expressed by Kang Hwee Gee J in *Sime Bank Bhd*, at p 684F in these words:

> Viewed from the objective standpoint of the need of contracting parties in commercial contracts to define their rights and obligations with, precision, had it been the intention of the parties that their obligations should be read subject to the conditions imposed in any other agreement, they would have been set out clearly in the put opti0n agreement.

[42] In the circumstances, I hold that there is no assignment under s 4(3) and that the plaintiffs' cause of action is against the defendant and not against the employer and so the issue raised for the defendant is not a triable issue.

SECTION 42 CONTRACTS ACT 1950

[43] The defendant submitted that the plaintiff is precluded by s 42 from making claims from the defendant after the plaintiff has claimed payments from the employer in respect of the first 14 certificates, seeking support in:

(i) *Haji Nik Ishak bin Haji Nik Daud v Nik Zainab binti Nik Jaafar* [1975] 2 MLJ 82 (PC); and

(ii) *Chinn Swee Onn v Puchong Realty Sdn Bhd* [1990] 1 MLJ 108 (SC).

[44] For the plaintiff, it was stressed that the defendant's learned counsel has misconstrued s 42, adding that the plaintiff is not precluded from enforcing its claim against the defendant, on the basis of:

(i) *TT Martech Sdn Bhd v Wing Construction (M) Sdn Bhd* [2005] 2 MLJ 463 (HC); and

(ii) *Chong Hee v Credit Corp (M) Bhd* [1999] MLJU 456 (HC).

[45] In my view, this issue is also intertwined with the three aforesaid issues, the difference being in the label only. Be that as it may, I shall also consider whether it is a triable issue.

[46] Section 42 reads:

> 42 Effect of accepting performance from third party.
>
> When a promisee accepts performance of the promise from a third party, he cannot afterwards enforce it against the promisor.

[47] Section 42 came up for consideration by me in *Re Krishnan Rengasamy; ex p Arab Malaysian Credit Bhd* [2001] 4 CLJ 797 where the relevant facts reveal a letter alleging that an agreement has been reached between a third party and the judgment creditor to settle the debt which led to the bankruptcy notice issued against the debtor. Upon a proper perusal of that letter, it was found that the third person would like to propose a settlement with an upfront payment and subsequent monthly instalments. That was obviously a mere proposal for settlement as opposed to a settlement agreement. Accordingly, at p 803d-e I held that:

> In order to invoke s 42, an agreement must have been achieved between the promisee and the promisor and there must have! been complete (as opposed to partial) performance by the third party. Even assuming that there was a settlement agreement {when actually there was no such agreement at all), there must be complete performance by the third party before s 42 can apply: *Scott & English (Malaysia) Sdn Bhd v Foo Thor Lombong Bijih Sdn & Anor* [1985] 1 MLJ 73 (HC); *Har Chandi Lai & Ors, Sheoraj Singh* 39 1C 343; *Pollock & Mulla* (9th Ed) p 361.

[48] In *Haji Nik Ishak* and *Chinn Swee Onn*, it was held that s 42 can be invoked where e.g. the promisee has agreed to accept performance from the third party, in order to bring about a discharge thereof.

[49] However, on the facts before me, there was no agreement between the plaintiff and the defendant that the payment by the employer on the 14 certificates would discharge the defendant from the other payments due and payable under the balance three certificates.

[50] The defendant's contention herein does not appear to enjoy the support of two High Court judgments viz *Chong Hee*, and *TT Martech*.

[51] In *Chong Hee*, Ian Chin J held that the application of s 42 is very much dependent upon the terms of the agreement between the parties, adding that the mere fact of acceptance by the plaintiffs of the payment of three instalments by a third party cannot by itself attract the application of that section as that payment must be made pursuant to an agreement arrived at between the plaintiffs and the defendant and it must be pursuant to a term in that agreement that the plaintiffs would no longer look to the defendant for payment.

[52] The above judgment was followed by Abdul Malik Ishak J in *TT Martech*, where it was held that even the existence of a deed of assignment would not absolve the defendant from its liability to pay for goods which had been delivered by the plaintiff to the defendant as s 42 would not apply there.

[53] In the circumstances, I am unable to sustain the defendant's above contention.

CERTIFICATION

[54] The defendant submitted that:

(i) the balance three certificates were not properly certified in accordance with cl 16.1 of the conditions of subcontract ('cl 16.1') as the signature of the defendant's general manager or project director does not appear in any of these balance three certificates which are therefore not valid, citing *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perils Sdn Bhd* [1987] 2 MLJ 332 (SC); and *Ribaru Bina Sdn Bhd (dahulu dikenali sebagai Ribar Resources Sdn Bhd) & Anor v Bakti Kausar Development Sdn Bhd & Anor* [2003] 5 AMR 165 (HC); and

(ii) even if the balance three certificates were valid, they contain a rider 'Total Payment Recommended' and so are not final, on the basis of cll 16.2 and 16.5 and *Ribaru Bina Sdn Bhd*.

[55] The plaintiffs' contention is that the first 14 certificates and the balance three certificates were in fact certified in the same manner and the former had been honoured in full, as a result of which the latter should not be questioned by the defendant, in view of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1955] 2 MLJ 57 (SC).

[56] In my judgment, it is to be noted that without any qualms whatsoever, payments on the first 14 certificates have been effected pursuant to cl 6.1 and the defendant's letter. Both the first 14 certificates and the balance three certificates have been certified by the defendant in identical fashion. There has been no suggestion by the defendant that the certification of the first 14 certificates were not valid nor was there any submission that the honouring of the first 14 cerificates had been wrongly effected. The doctrine of estoppel expressly contained in s 115 of the Evidence Act 1950 and as enunciated by the Federal Court in *Boustead Trading*, would certainly apply to preclude the defendant from raising this submission.

[57] In considering *Gunung Bayu*, cited for the defendant, I find that the building contract there provided, inter alia, for progress payments to be made based on

interim certificates to be issued by the appellant's architect, Hijjas Kasturi Associates Sdn Bhd. The work proceeded and interim certificates were issued for work done. These certificates were signed by a graduate architect who had not been registered. The appellants refused to honour all the certificates. Wan Suleiman SCJ (as he then was) delivered judgment for the Federal Court and held that there appeared to be a plenitude of triable issues there.

[58] In my view, the facts there had taken a different dimension and are readily distinguishable from those in the instant appeal, especially when none of the certificates there had been honoured, while the first 14 certificates in the instant appeal had been honoured, in the insjtant appeal, leaving the balance of the three certificates.

[59] Next *Ribaru Bina*, concerns the defendant's failure to pay the amount certified under certificate No 11 which did not bear the necessary certification as provided for by cl 7 in the contract there. Payments on all previous certificates 1-10 were made in full, although they did not have the requisite certification in that they had been signed by the managing director and executive director of the defendants, whereas certificate No 11 was signed by only the director. All the certificates contain a rider 'amount suggested for payment'. There was no proof tying the second defendant to the works contract. One of the issues for consideration was whether certificate 11 was valid. Vincent Ng J held:

(i) The rider did not connote a conclusive or indisputable certificate demanding strict compliance and when the finality or contents of periodical payment certificates were impugned with cogent reasons, it should be investigated at full trial (p 172 lines 19-36); and

(ii) It is plainly arguable whether certificate 11 could constitute a binding and unqualified admission of debt (p 173 lines 17-27).

[60] By way of comparison and contrast, the distinguishable feature in *Ribaru Bina*, is that not all the certificates there had been signed in the same manner as has been done in all the 18 certificates before me. While I agree with the judgment of the learned judge there, I am constrained to add that the said distinguishable feature militates against the defendant before me.

LEGAL POSITION OF INTERIM CERTIFICATES

[61] The defendant sought to distinguish *Pembenaan Leow Tuck Chui*, relied on by the plaintiff, in that cl 30(1) of the PAM Standard Form of Building Contract ('cl 0(1)') there made no provision for direct payments from the employer to the subcontractor and dealt with payment by the employer to the contractor and so it is poles apart from cl 6.1 herein.

[62] On the other hand, the plaintiff relied on *Pembenaan Leow Tuck Chui*.

[63] First, the relevant facts in *Pembenaan Leow Tuck Chui*, were that the appellant builder had agreed to construct a private hospital for the respondent-employer.

Clause 30(1) provided that the architect would issue an interim certificate to the builder to be presented to the employer who would then make payment within 21 days from the date of presentation. In 1992, the architect issued the penultimate certificate ('the certificate') for a sum of RM433,299.97 which the employer failed to pay. The builder sued the employer and sought summary judgment for the same. The employer filed a cross-claim for damages against the builder for defective work and over-valuation. The trial judge dismissed the builder's O 14 application. On appeal, the issue for decision was whether an employer under a building contract was under an obligation to pay upon being served with the certificate when it had made the cross-claim against the builder. The Supreme Court gave the answer in the affirmative, allowed the appeal and entered summary judgment for the builder.

[64] The judgment of the court was delivered by Edgar Joseph Jr SCJ (as he then was). At p 64D, his Lordship made it clear that the certificate, the subject matter of the appeal, was undoubtedly an interim certificate under cl 30(1) and that the builder shall be entitled to the payment and the employer shall be obliged to honour the sum so certified within 21 days from the date of the presentation to the employer of the certificate; and added at p 75B that for all practical purposes, the certificate conferred temporary facility thereon and a right to immediate payment in full in the absence of an express contractual provision permitting deduction of the matter in question.

[65] I am unable to sustain the defendant's submission that cl 30(1) in *Pembenaan Leow Tuck Chui*, and cl 6.11 herein are poles apart. The fact that cl 6.1 provides for the payment by the employer does not in any way affect the legal position of an interim certificate as enunciated by the Supreme Court.

DEFENDANT'S ADMISSION

[66] The plaintiff referred to the letter dated 17 February 2005 issued by the defendant's accountant to support the contention that the defendant has in fact admitted the sum due and payable under the balance three certificates, and cited *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC).

[67] It was argued for the defendant that the letter does not constitute an admission of the sum claimed herein, relying on *Low Yoke Lan v Ng Ooi Kiat* [2001] 4 AMR 4781 (HC).

[68] There seems to be a conflict of affidavit evidence despite the existence of contemporary document in the form of the letter of defendant's accountant.

[69] In this regard, I am mindful of the function of a judge in hearing an O 14 application. That has been set out in the majority judgment delivered by Mohamed Azmi SCJ (as he then was) for the then Supreme Court in *Bank Negara Malaysia*, where the salient principles may be stated as follows:

(i) basic to the application is the requirement under 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable;

(ii) the determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court;

(iii) on the treatment of conflict of evidence on affidavits, although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statement by the same deponent, or inherently improbable in itself it may be, following the advice delivered for the Privy Council by Lord Diplock in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at p 217;

(iv) under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit; and

(v) where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

[70] Applying the above principles generally and principles (iii) and (v) specifically, I shall refer to the contemporary document, ie the letter of defendant's accountant as follows:

HO HUP CONSTRUCTION COMPANY BERHAD

(14034-W)

Head Office: 2 Medan Imbi 55100 Kuala Lumpur Malaysia. Tel: 60-3-2148-7711 Fax: 60-3-2142-4988 E-mail: hohup@ hohup.net Website: www.hohup.net

Date 17th February 2005

KM Quarry Sdn Bhd

BB-456, Tmn Melaka Baru

75350 Batu Berendam

Dear Sirs,

Ernst & Young is now engaged in an examination of our financial statements. In this connection, they wish to confirm the balance due from us on your account at 31 December 2004 which was shown in our records as RM4,069,493.46.

Please state in the space below whether or not it is in agreement with your records at that 4ate, giving reasons for any disagreement, as the case may be.

After signing, stamping and dating your reply, please mail it directly to the auditors. A reply paid envelope is enclosed for your convenience.

Yours faithfully,

...

Name: Siah Chin Wee

Designation Accountant

[71] Plaintiff, vide letter dated 25 March 2005, another contemporary document, responded with the relevant specific particulars as follows:

Our ref: LD.A/l/9/KMQ/(L007) 25

March 2005

ERNST & YOUNG

P.O. Box 11040 50734

Kuala Lumpur

Dear Sir,

AUDIT CONFIRMATION OF AMOUNT DUE FROM HO HUP CONSTRUCTION COMPANY BEiRHAD TO KM QUARRY SDN BHD FOR YEAR ENDING 31ST DECEMBER 2004

We refer to Ho Hup Construction Company Berhad's ('Ho Hup') letter dated 17 February 2005 requesting our confirmation to your good-office pertaining the above matter.

Our records showed that the sum of RM4,069,493.46 as stated and recognized by Ho Hup's in ttyeir said letter being the total monies owing by themselves to us as at 31 December 2004 is in respect of our Certified Claims and Retention Sum under the sub-contract for 'DRAINAGE, PAVEMENT AND TRAFFIC MANAGEMENT FOR CADANGAN PEMBINAAN JALAN RAYA DURIAN TUNGGAL PAYA RUMPUT-SUNGAI UDANG MSLAKA', details as follows:

(a)	Total certified amount remaining outstanding and due	RM3,233,474.37
(b)	Total retention sum as certified	RM 836,019.09
	Therefore the total amount certified and yet to be paid to us is	RM4,069,493.46

Please be further informed that we have instituted court proceedings against Ho Hup for the recovery of undisputed and certified monies owing to us under item (a) of the above. We reserve the right to commence legal or other proceedings to recover the balance value of work done yet to be certified and/or claimed and also the sum under item (b) in the event certifications and payments of the same is not forthcoming.

This letter is made without prejudice to our current and any future claims against Ho Hup, over find above those set out above.

Thanks and Regards,

for KM QUARRY SON BHD
...
DAVID LEE
Director
Copy to: YBhg Datuk Soon Han Szu, DMSM, PJK, JP, Executive Director, KMQ Pn Surayah Salleh, Group Legal Manager, BPHBB

[72] It is significant to observe that there has been no contemporaneous challenge by the defendant or the defendant's auditors on the above debt due and owing by the defendant to the plaintiff.

[73] Upon a true construction of the contents of these two contemporary documents, by way of correspondence between the parties herein, there can be no doubt that the defendant has in clear and unambiguous words confirmed and admitted the balance due from the defendant as shown in the defendant's records and that balance was the amount certified in the balance three certificates. The defendant is a public listed company and like all companies incorporated under the Companies Act 1965, their accounts are regulated by Part VI Division 1, ss 167 to 171 of the Act. There has been no suggestion by the defendant that the defendant's records and accounts had been wrongly maintained.

[74] In my view, the letter of defendant's accountant is a singularly significant and crucial contemporary document that has now completely negated all the preceding contentions raised for the defendant, as that letter constitutes a cogent built-in self-rebuttal wiping out the defendant's entire case.

[75] I therefore hold that the letter of defendant's accountant read conjunctively with the plaintiffs' reply thereto represent the true position between the plaintiff and the defendant. I reject the defendant's contention herein which seeks to brush aside the letter of defendant's accountant, notwithstanding the fact that the defendant has plainly and obviously admitted, inter alia, the sum claimed by the plaintiff herein.

CONCLUSION

[76] The long and short of my judgment is that whenever the existence of an undoubted admission has been established and put in place, one should refrain from making a futile attempt to find or, worse still, create a triable issue, when there is none, because that would not bring any merit to the party seeking to deny the truth of one's own contemporary document.

[77] I hold that the learned registrar has arrived at a correct decision as reflected in his well-considered written grounds which I hereby affirm. I therefore dismiss the defendant's appeal with costs.

Appeal dismissed with costs.

Reported by John Paul Simon